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# Canonical Defamation in Medieval England

by R. H. HELMHOLZ\*

It is a commonplace of legal history to say that defamation was a spiritual offense in medieval England.<sup>1</sup> Slanderous words gave rise to a cause of action in the ecclesiastical courts. This article is meant to supply some information on that action as it appears in the surviving records of England's Church courts. One of the difficulties of most modern treatments of the subject is that they must rely heavily on the rules of the royal courts about the proper sphere of ecclesiastical jurisdiction.<sup>2</sup> That is the theme of the early Year Book cases. But it is necessarily second-hand evidence. Substantial numbers of actual Church court records are available, although they are unprinted and scattered in archives throughout England. It seems worthwhile to make use, even if it must sometimes be a tentative use, of their testimony on the actual working of the law of defamation in the Church courts.

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Discussion of the substantive law may be prefaced with some statistics. Absolute certainty as to how far any figures are representative is, of course, impossible to obtain. The extent of record sur-

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1. E.g., ". . . le cas de diffamation est tout spirituel offence, qui ne poit auterment estre puni forsque la." Y.B. Trin. 12 Hen. VII f. 24b (1497). See also Y.B.B. Trin. 17 Edw. IV, f. 4, pl. 2 (1477); Mich. 27 Hen. VIII, f. 14, pl. 4 (1535). For modern comments see W. Holdsworth, *A History of English Law*, 5th ed. (London, 1942), v. 3, p. 410-11; F. Pollock and F.W. Maitland, *The History of English Law*, 2d ed. (Cambridge, 1968), v. 2, p. 536-37; C.H.S. Fifoot, *History and Sources of the Common Law, Tort and Contract* (1949), 126-28; E. Garth Moore, *An Introduction to English Canon Law* (1967), 4; S.F.C. Milsom, *Historical Foundations of the Common Law* (1969), 333-35.

2. In addition to the references given above, see Van Vechten Veeder, "The History of the Law of Defamation," *Select Essays in Anglo-American Legal History* (1909), v. 3, p. 446-73; J.C. Courtney, "Absurdities of the Law of Slander and Libel," 36 *American L. Rev.* 552-64 (1902). But cf. A.K.R. Kiralfy, *A Source Book of English Law* (1957), 391-400, which contains translations of ecclesiastical records.

vival is too spotty. But what has survived suggests that defamation cases were always a significant part of litigation in the English Church courts. In the Consistory court of Rochester, for example, seventeen of ninety cases heard in 1438 were actions for defamation.<sup>3</sup> Between Michaelmas 1491 and the same term in 1493, the official principal of Hereford heard twelve such suits, out of a total of 176.<sup>4</sup> At Lichfield in the years 1465 through 1467 forty-five of 259 actions introduced were defamation actions.<sup>5</sup> And the Canterbury Commissary Court heard eight of these suits in 1373, out of a total number of 113.<sup>6</sup> Defamation actions thus never represented the major item of business. But they were a regular and important part of canonical litigation throughout the later medieval period.

The legal foundation for these actions of defamation was, in the Province of Canterbury, a constitution enacted by the Council of Oxford in 1222.<sup>7</sup>

Excommunicamus omnes illos qui gratia odii, lucri, vel favoris, vel alia quacunq[ue] de causa malitiose crimen imp[on]unt alicui, cum infamatus non sit apud bonos et graves, ut sic saltem ei purgatio indicatur vel alio modo gravetur.

We excommunicate all those who, for the sake of hatred, profit, or favor, or for whatever cause, maliciously impute a crime to any person who is not of ill fame among good and serious men, by means of which at least purgation is awarded to him or he is harmed in some other manner.

A variant version was adopted in the diocese of York, but it did not

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3. Taken from Kent County Record Office, Maidstone, Act book DRb/Pa 1.

4. Episcopal Archives, Cathedral Library, Consistory Court Act book I/1.

5. Joint Record Office, Lichfield, Act book B/C/1/1.

6. Dean and Chapter Library, Canterbury, Act book Y.1.1. Numbers of defamation suits increased in the fifteenth century; from the middle of the century there were usually fifty a year. See B. Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952), 88. Dr. R.W. Dunning has calculated that defamation suits came to about one-fifth of the total in the Wells Consistory court; see "The Wells Consistory Court in the Fifteenth Century," *Proceedings of the Somersetshire Archaeological and Natural History Soc.*, Vol. 106 (1962), p. 59.

7. F.M. Powicke and C.R. Cheney, eds., *Councils and Synods with other Documents relating to the English Church*, II, A.D. 1205-1313, (1964) v. 1, p. 107. For medieval commentary, see W. Lyndwood, *Provinciale* V, 17, c. *Auctoritate Dei Patris* (Oxford, 1679), 345-48.

differ in any legally important aspect.<sup>8</sup> Court records show the uniform application of this remedy. English formularies invariably give documents based on the Oxford constitution.<sup>9</sup> And the libels and sentences from the court records show the same use of the provincial or diocesan action.<sup>10</sup>

A particularly interesting case comes from the late thirteenth century Canterbury records. The complainant apparently had brought his original action at the papal court. As was normal, this resulted in the delegation of papal jurisdiction to a local cleric, in this case an English prior. The rescript of delegation, specifying the terms of law by which the prior was to decide the case, did not mention the constitution of Oxford. But the libel in the actual trial was quite specific. The defendant was alleged to have fallen "in sententiam maioris excommunicationis in consilio Oxon' contra tales diffamatores latam."<sup>11</sup> Even here, the Provincial constitution provided the framework for the hearing. The wording of that constitution determined the scope of the remedy for defamation available in the English Church courts.

All defamation actions had, therefore, to be based on the precise wording of the constitution. It determined, in the first place, what words were actionable. The statute specified that the language must have imputed a crime to the complainant. The cases bear this out. It was defamatory to call someone a thief, as in a London action where a man said, "Thow art the woman that stolest the kyetyl from

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8. Councils and Synods, I, 496 for York; II, 820 for Durham, which follows the Southern model.

9. The precise language of the Constitution is repeated in these formularies: British Museum, Reg. II A XI, fols. 6v-7r; Harl. MS. 2179, fols. 65v-66r; Inner Temple Library, London, Petyt MS. 511.3, f. 106v; Dean and Chapter Library, Canterbury, MS. D 8, f. 9r.

10. A typical sentence in a defamation action begins: "Idcirco nos commissarius antedictus solum Deum pre oculis habentes, prefatam Johannam Pope in maioris excommunicationis sententiam contra huiusmodi diffamatores in constitutione provincie Cant' que sic incipit *ex auctoritate dei patris* etc. . . . incidisse pronunciamus et declaramus." Canterbury, Act book Y.1.5, f. 47v (1456). York documents speak of falling "in maioris excommunicationis sententiam contra huiusmodi diffamatores latam et promulgatam auctoritate constitutionis synodalis Ebor'." Borthwick Institute, Cause papers R VII F 100 (1431). Cause papers are the formal documents used in the course of litigation, recording the pleadings, the evidence, and the judgment. As presently arranged at the Borthwick Institute, each file, with a few exceptions, contains the papers for a separate case. See J. Purvis, *The Archives of York Diocesan Registry*, St. Anthony's Hall Publications, No. 2 (1952), 13-14.

11. Canterbury, Ecclesiastical Suits, No. 70 (1288).

the Old Swan.”<sup>12</sup> It was actionable to name another man as a “public perjurer”, as in a Canterbury case from 1373.<sup>13</sup> Likewise, imputation of forgery,<sup>14</sup> of heresy,<sup>15</sup> of manufacturing false evidence,<sup>16</sup> of adultery,<sup>17</sup> of procuring the death of an innocent man<sup>18</sup> were all actionable.

On the other hand, it was not defamatory to call a woman a “scalde”, since this involved no crime.<sup>19</sup> Nor apparently was the mere insult of naming another “serviens unius rustici” without more.<sup>20</sup> Some of the phrases one finds in the court books were doubtless nothing but common insults. To shout that a woman was

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12. Guildhall Library, London, Deposition book MS. 9065, f. 204r (1494). Allegations of theft were frequently the basis for defamation suits. Examples are: Canterbury, Act books Y.1.3, f. 148v (1420); X.1.1, f. 129v (1457); Rochester, Act book DRb/ Pa 2, f. 64r (1447); Hereford, Act book 0/2, p. 31 (1442); York, Cause papers R VII E 170 (1364); R VII F 27 (1406); *Depositions and other Ecclesiastical Proceedings from the Courts of Durham from 1311 to the Reign of Elizabeth*, ed. J. Raine, Surtees Soc., Vol. 21 (1845), 27.

13. Act book Y.1.1, f. 25r: “fuit perjurius publicus in depositione sua in causa matrimoniali.”

14. Canterbury, Ecclesiastical Suits, No. 70 (1288); York, Cause papers R VII F 100 (1431): “usus fuit in emptione et venditione falso auro et lege regis reprobato.”

15. London, Deposition book MS. 9065, f. 215v (1494); Norwich, Norfolk Record Office, Deposition book DEP/ 1, f. 14v (1500): “Thow art an heretik and a Lollard.”

16. Rochester, Act book DRb/ Pa 1, f. 123v (1439): “imponendo ei quod ipse falsas evidencias fabricasset.”

17. Ely, “Registrum Primum,” Cambridge University Library, EDR D/2/1, f. 21v (1375): “imponendo sibi crimen adulterii.” Canterbury, Sede Vacante Scrapbook III, No. 270 (1290); York, Minster Library Court Book M 2 (1)f, f. 27r (1389); *Act Book of the Ecclesiastical Court of Whalley*, ed. A.M. Cooke, Chetham Soc., Vol. 44, N.S. (1901), 17-20.

18. York, Cause papers R VII E 59 (1347).

19. Canterbury, Act book Y.1.1, f. 22v (1372). In this case, proceedings were suspended and a day assigned *ad concordandum* when the complainant could allege only this word as defamatory matter. Ordinarily a day would have been assigned *ad libellandum*. But cf., for two apparently contrary cases, *Acts of the Collegiate Church of SS. Peter and Wilfrid, Ripon, A.D. 1452 to A.D. 1506*, ed. J.T. Fowler, Surtees Soc., Vol. 64 (1874), 2, 58. And for some post-Reformation cases, see R.A. Marchant, *The Church under the Law; Justice, Administration and Discipline in the Diocese of York, 1560-1640* (1969), 71-74.

20. York, Cause papers R VII E 72 (1356). In this case, although the record is not unambiguous, proceedings seem to have continued only after the complainant added to the original allegation. She noted that the defendant had also called her *meretrix sacerdotis*.

a "strong harlot" was probably no more than a term of general abuse.<sup>21</sup> But the words technically included a crime punishable in a public court. Therefore they were enough to give rise to a claim for defamation. Words which were merely abusive were not.

It was not necessary, however, that the crime be actually named or unequivocally stated. If the words implied the commission of a crime, this was enough. The doctrine of *mitior sensus* which complicated the early Common Law remedy found no place in the canon law courts.<sup>22</sup> To say, for example, "I see a monk at the door of the priory of Rochester who did not lie in his own bed that night," while a monk was standing in the doorway, gave rise to a cause of action in a Rochester case of 1462.<sup>23</sup> It implied the monk's incontinence. Similarly, for a man to say that he had found a woman "lying together with Richard Porter in a barn with the doors closed," was enough to allow the woman to sue for defamation. That the words could be construed to imply something other than fornication was apparently no defense.<sup>24</sup> In an interesting York case from 1424, Thomas More was cited for claiming to have spoken with the spirit of a dead man. The spirit had ordered him, he claimed, to tell the dead man's son to restore property wrongfully taken from More. This had been sufficient, it seems, to have given rise to common fame that the dead man had stolen the goods. To clear the dead man's name, More was required to do public penance during divine service. He had to announce to the local congregation that he had falsely defamed the dead man.<sup>25</sup>

Considerable latitude was thus allowed in the degree of specificity with which the crime had to be named. Because of this fact, the canonical remedy for defamation covered a broader range of insulting words than might at first appear. The number of human

21. The term is many times repeated in the late fifteenth century London records. See Guildhall, Act book MS. 9064/ 1 (1470-73).

22. On this rule, under which defendants sought to escape liability by claiming that their words could technically be construed so as not to constitute a crime, see Milsom, *Historical Foundations*, 338; Prosser, *Handbook on Torts* §106 (3d ed., 1964), 764.

23. Act Book DRb/ Pa 3, f. 442r: It is worth noting that the defendant sought unsuccessfully to claim lack of specificity: "Fatetur quod talia dixit, sed quod non nominavit aliquam personam in specialem."

24. Rochester, Act book DRb/ Pa 4, f. 304v (1496): "inveniebat eam in orreo simul cum Ricardo Porter iacentem suspecte et clausis hostiis."

25. York, Borthwick Institute, Act book R VII Cons. AB 2, f. 40v (1424). A somewhat similar case, in which the slander originated with a woman who was dead at the time of the action, is referred to in a letter from Henry Dispenser, bishop of Norwich from 1370 to 1406; see M. Dominica Legge, ed., *Anglo-Norman Letters and Petitions*, Anglo-Norman Text Soc., Vol. 3 (1941), 383-84.

actions punishable as crimes of some sort in medieval England was considerable. Allegations of professional incompetence were unfortunately not included. Only very rarely would they have included a crime. And I have found no examples in the surviving Act books. This must be counted as one of the real lacks in the Church court action. But the allegation of criminal conduct, in actual practice, still embraced a large amount of the defamatory language of daily life.

No distinction was made between crimes punishable by the secular courts and those punishable by the Church. The royal courts were developing the rule that if the crime were one they alone could try, a writ of prohibition would lie.<sup>26</sup> Under this doctrine, defamation in the ecclesiastical tribunals would be limited to the imputation of distinctly spiritual crimes—heresy, adultery and the like. Allegations of theft and homicide could not be dealt with by the Church courts. But, whatever the developed Common Law rule, ecclesiastical practice did not conform to it in the Middle Ages. All crimes were treated alike in defamation actions.<sup>27</sup> And the court records show negligible numbers of prohibitions interrupting suits for defamation. The Church courts went their way largely unmolested in this area.

English Common lawyers had an apparently good reason for allowing a royal writ of prohibition where the imputation was of a purely secular crime. Without such a prohibition, they reasoned, a canonical action for defamation could be brought against a man who had accused another of a crime in the royal courts. To subject such an accuser or indictor to a defamation action was surely an abuse. It was an indirect attack on the royal courts themselves. A statute of 1327 and several cases found in the Year Books and plea rolls can be found prohibiting the practice.<sup>28</sup>

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26. Y.B.B. Trin. 22 Edw. IV, f. 20, pl. 47 (1483); Mich. 27 Hen. VIII, f. 14, pl. 4 (1535); Co. Lit. 96 b. In one fourteenth century formulary, beside the forms for defamation by calling another a thief is written in a later hand: "Quere an hodie curia ecclesiastica de hiis diffamacionibus cognoscat." London, Inner Temple Library, Petyt MS. 511.3, f. 35r.

27. See also Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury*, 88.

28. I Edw. III, st. 2, c. 11. In a case from 1358, for example, a prohibition issued to stop ecclesiastical proceedings against jurors for their verdict in a royal court. London, Public Record Office, K.B. 27/392, Rex m. 18. See also: W.R. Jones, "Relations of the two Jurisdictions: Conflict and Cooperation in England during the thirteenth and fourteenth centuries," *Studies in Medieval and Renaissance History*, VII (1970), 201-202; H. Potter, *An Historical Introduction to English Law and its Institutions* (1932), 360.



But it is another question whether the ecclesiastical courts habitually entertained such abusive actions. The Constitution of Oxford specifically required that the imputation be made maliciously. Lyndwood, glossing that word, gave it as a rule that accusations made and proved in the course of legal proceedings did not fall within the wording of the Constitution.<sup>29</sup> By definition, they were not made maliciously. He drew no distinction between secular and ecclesiastical jurisdictions. Neither, it would seem from Lyndwood's treatment, would give rise to a defamation action.

The actual court records, while not so full here as one could wish, suggest that Lyndwood's rule was observed in practice. In a Rochester defamation action brought for imputation of theft, the complaint was dismissed when the defendant showed that his only offense consisted of having brought an action for wrongful conversion against the complainant.<sup>30</sup> In another case, an archdeacon sued for defamation successfully pleaded that his accusation of adultery against the complainant had been made in the course of a judicial action. He had been merely carrying out his duties.<sup>31</sup> There is a case from York in 1364 where an action for defamation was allowed after a secular prosecution for theft. But it was also shown that in the secular court the complainant had established his innocence. Notwithstanding that fact, the defendant had repeatedly uttered his accusations of theft. He was apparently dissatisfied with the judgment vindicating the complainant. Here the Church court allowed a remedy.<sup>32</sup>

This is not to say, of course, that no actions based on the previous indictment or suit at Common Law were ever entertained in the ecclesiastical courts. Surely they were. Lyndwood's gloss does in fact leave room for actions against an unsuccessful accuser who acted out of malice towards an innocent man. But even leaving this case aside, one must recognize that the procedure of the Church courts could be used against innocent men as well as the procedure of the royal courts. Complicated court systems nearly always leave room for abuse. But the requirement of malice was an attempt, within the canon law itself, to deal with that abuse. And

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29. *Provinciale*, V, 17, c. *Auctoritate Dei s.v. malitiose*: "Quia vocat quis aliquem latronem, perjurum, homicidam, vel adulterum, et hoc dicit in iudicio per viam accusationis, vel dununciationis, et id probaverit, non incidit in hanc poenam."

30. Act book DRb/Pa 2, fols. 246r-246v (1454): "Et quantum ad crimen furti, dicit quod non imposuit sibi crimen furti nec aliquid dixit maliciose de eodem, sed peciit et vendicavit unum flameolum quod fuit uxoris sue et quod idem Willelmus habuit quo iure ignorat."

31. Canterbury, Sede Vacante Scrapbook III, No. 270 (1290).

32. York, Cause papers R VII E 170.



the records do not indicate that the Church encouraged large numbers of actions against Common Law indictors. It is dangerous to take the Common Lawyers' objections to a practice, and to draw the conclusion that the practice was the norm in the Church courts.

For the legal historian, it is noteworthy that defamation by prior judicial action was excluded from coverage by the Oxford constitution's requirement of malice. The necessity of malice in the later Common Law remedy, as modern commentators often note, has given rise to considerable difficulties, not wholly resolved by legal fictions developed over the course of time.<sup>33</sup> It would be rash, until more research has been done on the growth of defamation in the royal courts, to say categorically that this requirement came into English law by way of the canon law. I can do no more than suggest that English law may have included the requirement of malice because it incorporated this part of the canonical action. It is at least a strong possibility.

To say this, of course, attaches no blame to the canon law remedy. The requirement of malice was not at all out of place in the Church courts. Since, as we shall see, the punishment of the defamer was varied according to his guilt and to the degree of harm he had caused, it was quite relevant for the judge to know with what malice a defendant had acted. In a London case of 1495, for example, we learn that after accusing a woman of giving birth to a priest's child, William Strome immediately thought better of it. He apologized for his words. He asked for the woman's pardon.<sup>34</sup> Or, to take the opposite case, in the York court one defendant was said to have remarked after his initial accusation, "What I saw I wish to say and never to deny."<sup>35</sup> In another case, it was relevant that the imputation had been made repeatedly (*iteratibus vicibus*) and not just in the heat of anger (*non tantum calore iracundie*).<sup>36</sup> All these were important in assessing the seriousness of the ill fame, the extent of its spread, and the proper remedy for its public correction.

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According to the Oxford constitution, the complainant in a defamation action had to show some sort of harm. At least, it reads,

33. See, for example, the interesting article "Slander and Libel," 6 *American L. Rev.*, 593-613 (1872), in which the doctrine of legal malice is called, at 610, "pure scholasticism." And see, for early history, W. Holdsworth, "Defamation in the 16th and 17th Centuries," 41 *L. Q. Rev.* (1925) 24-28.

34. Deposition book MS. 9065, f. 227v.

35. Cause papers R VII E 171.

36. Cause papers R VII F 61 (1411).

he must have been put to a canonical purgation as a result.<sup>37</sup> In practice, such a purgation often became merely a preliminary to a defamation action. A man, alleging that a crime had wrongfully been imputed to him, came before the judge and "asked to purge himself of that crime."<sup>38</sup> Or a judge might assign purgation because of widespread public fame.<sup>39</sup> If the defamed person successfully purged himself, an action for defamation, tried like any other instance case, could begin. This sort of purgation was an entirely normal part of canon law where there was public fame of a crime.<sup>40</sup> The English action for defamation built on that procedure.

In practice then, no actual damages had to be shown where purgation was used. But allegations of actual damages were by no means uncommon. They were again relevant to assessing the amount of harm done and the proper way of restoring a complainant to good fame. Thus we find in the libel and articles claims that the words had "caused the complainant to lose his goods,"<sup>41</sup> or that he had "sustained several labors, expenses and vexations on account of the imposition of this crime,"<sup>42</sup> or that a woman's husband had "refused to admit her to his bed as he was accustomed to"<sup>43</sup> on account of the slanderous words.

Conversely, defendants sometimes answered that no damage had in fact occurred. In a York case of 1356, for example, it was said that the complainant was "of no worse fame after the utterance than before."<sup>44</sup> As this suggests, the most frequent defense to defamation actions was the existence of prior defamation. If a man had been previously and publicly reputed to be guilty of the same

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37. On this see the discussion in Lyndwood, *Provinciale*, V, 17, c. *Auctoritate Dei s.v. ut sic*.

38. Lincoln, Diocesan Record Office, Court book Cj/1 (1493-1504), f. 18r; Canterbury, Act book Y.1.3, f. 148v (1418).

39. Canterbury, Act book Y.1.2, f. 10r (1397), Hereford, Act book 0/2, 31 (1442); Rochester, Act book DRb/Pa 2, f. 175v (1452).

40. See X 5.34.1, 5, *Corpus Juris Canonici*, ed. A. Friedberg (Leipzig, 1879-81).

41. London, Deposition book MS. 9065, f. 27v (1487): "Causaverunt ipsum perdere bona sua."

42. *Ibid.*, f. 88r (1490): "sustinuit nunnullos labores expensas et vexaciones pretextu impositionis huiusmodi criminis."

43. Canterbury, Ecclesiastical Suits, No. 318 (c. 1290): "dictus dominus Robertus maritus suus eo pretextu noluit ipsam ut uxorem ad lectum suum aliquid admittere . . . prout prius consuevit."

44. Cause papers R VII E 72: ". . . fama et status dicte Alicie non sunt multum lesi nec in aliquo deteriorati. . . quia non audivit eam ut dicit reputari per aliquos deterioris fame post quam fuerat ante."

crime, then the act of repeating the rumor did not fall within the Constitution. It required that the ill reputé have originated with the defendant. And thus we find defenses like this one: "These words did not have their origin (from him); but common voice and fame held these things long before he uttered the words."<sup>45</sup> Lyndwood remarked on the frequent use made of this defense in the Church courts. He noted that it led to unfortunate results, since it allowed a man to greatly augment the extent of publication, to enlarge the damage caused, and then to escape punishment by pleading prior defamation.<sup>46</sup> The cases do not, unfortunately, reveal to what extent the judges overcame this difficulty. Lyndwood's words suggest that they did not.

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To turn now more directly to the question of punishment or damages, we are met with a second instance of possible dispute over jurisdiction. The writ, or so-called statute, *Circumspecte Agatis* (1286) limited the Church courts to spiritual penalties in defamation. No money damages were to be available.<sup>47</sup> An opening was, however, left open. After a successful prosecution, a defendant might receive a corporal penance, then redeem it for a money payment. But it had to be according to his wishes, not consequent upon a formal sentence by the judge.<sup>48</sup> Otherwise, the action could be prohibited by the royal courts.

So far as the ecclesiastical records indicate, this limitation was followed in practice. No money damages, beyond the expenses normal in canonical litigation, were awarded in the formal sentences. Nor were they demanded in the libels. Public penance and

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45. Canterbury, Act book Y.1.3, f. 171r (1421); York, Cause papers R VII E 59 (1347); and see the formula for raising the defense: British Museum, Reg. 11 A XI, f. 60r.

46. Lyndwood, *Provinciale*, V, 17, c. *Auctoritate Dei s.v. unde*: "Si prius fuerit infamatus super eodem crimine, tunc non haberet locum ista poena, et sic practizant multi, qui ad evadendum hanc poenam dicunt, quod prius fuit infamatus super eodem crimine sibi imposito: sed mihi videtur quod ista litera non sit bona, et propterea quod practica non sit bona."

47. *Statutes of the Realm*, I, 101; *Councils and Synods*, II, 974-75; and see E.B. Graves, "Circumspecte Agatis," *English Historical Rev.*, Vol. 43 (1928), 1-20.

48. "In diffamacionibus libere corrigant prelati non obstante prohibicione, primo iniungendo penam corporalem quam si reus redimere velit libere recipiat prelatus pecuniam licet regia prohibicio porrigatur." *Statutes of the Realm*, v. 1, p. 102.

other "spiritual" penalties alone are detailed in the remaining documents.

Whether this is a direct consequence of the availability of a writ of prohibition is not entirely clear. The Constitution, it should be remembered, spoke only of the excommunication of an offender. It offered, in other words, only a spiritual penalty. It can thus be argued that the canon law remedy gave no direct money damages in the first place. Of course, this is true in a sense of all canonical actions. Excommunication was the severest penalty in the canon law.<sup>49</sup> Even in actions brought to enforce contracts, the suits for breach of faith which filled the English Church courts in the Middle Ages, the sanction for refusal to fulfill a contract was always excommunication. But it may be that there were special reasons within the canon law itself for limiting defamation actions to spiritual penalties. Quite apart from the limitations of the English law, there were practical reasons for avoiding the routine award of damages in the formal sentences.

First, a formal excommunication followed by informal bargaining about restitution to the injured party in exchange for the lifting of the sentence was an entirely suitable way of handling defamation cases. The number of variables in these actions was very large. There was something to be said for leaving the question of restitution and penance open, as the Constitution did. Then, after the sentence of excommunication, could come discussion of under what circumstances the sentence should be lifted. This might involve a money payment to the complainant, or it might not. But in any case, the penance or damages would be in return for the lifting of a sentence of excommunication. This was in harmony with both *Circumspecte Agatis* and the canon law of defamation.

It cannot, of course, be absolutely proved that this is what normally happened. Any bargaining about penance and its commutation which went on was not made part of the record. It is beyond recall. But certainly it is fair to say that the rules about damages imposed by the royal courts did not conflict directly with the ecclesiastical law of defamation itself. The Constitution of Oxford did not promise money damages. As such, the limitations of *Circumspecte Agatis* may not have been so stringent or restrictive of the Church courts as is sometimes said.

Second, the use of a broad range of "spiritual" penalties was actually a strength of the ecclesiastical courts' handling of defamation cases. At least this is true if one compares it to the later Common Law action. One of the handicaps of the modern law of libel

49. On this and the English Church's privilege of demanding capture of excommunicates by royal justice see F.D. Logan, *Excommunication and the Secular Arm in Medieval England* (1968), 13-15.

and slander is that it is limited to money damages.<sup>50</sup> Though courts today may consider the degree of fault by the defendant and the nature of harm to the plaintiff in assessing a proper amount of recovery, they are still, so to speak, stuck with strictly monetary damages. These are often of extreme difficulty to assess accurately. And they are sometimes quite other than what a plaintiff really needs or desires. What he wants is a public vindication of his reputation, an official declaration of his innocence and a public admission of error by the defamer. He wants, in short, a restoration to the good opinion of the community. No doubt, in the conditions of modern society, anything but money damages are impossible. But as a tool to restore a man's tarnished reputation, they are a blunt instrument indeed.

The ecclesiastical remedy in the Middle Ages, whatever its other limitations, fulfilled this function better than the later Common Law action. Sometimes, we find in the records, the complainant was content with a simple sentence of the court upholding his innocence. The judge "restored him to good fame."<sup>51</sup> Church courts were, by and large, local courts, and in a small community, where gossip moved freely and spread quickly, a simple sentence was sometimes enough. If necessary, an oath by the defendant might be added. He was occasionally obliged to swear publicly that he would not repeat the scandalous charge.<sup>52</sup> In some cases this oath was backed by a guarantee of a money penalty to ensure future good behavior.<sup>53</sup>

50. On this see Alec Samuels, "Problems of Assessing Damages for Defamation," 79 *L. Q. Rev.*, 63-86 (1963). See also E.C.S. Wade, "Defamation," 66 *L. Q. Rev.*, 348-57 (1950). Wade in fact suggests, at 354-56, the adoption of some of the same sorts of remedies used in the medieval Church courts.

51. E.g., "Dominus commissarius declaravit se bene purgatum, male diffamatum et restituit eum bone fame quantum in se fuit." Canterbury, Act book Y.1.3, f. 15v (1415). A similar formula is found in the British Museum formulary, Harl. Misc. 2179, f. 68v.

52. E.g., Canterbury, Act book Y.1.3, f. 54v (1417): "iurata est dicta Matilda de loquendo omnem honestatem de dicta Margareta in futuro." Canterbury, Act book Y.1.4, f. 103r (1422): ". . . quod habeat se honesto tam in verbis quam in gestura erga vicarium." See also London, Deposition book MS. 9065, f. 70r (1490).

53. In a case from 1417, the defendant was ordered not to defame the complainant in the future under penalty of twenty shillings, a third of which was to go to the defamed person, a third to the parish church, and a third to the prior of Canterbury, in whose court the action had been heard. Canterbury, Act book Y.1.3, f. 200v. In a York action of 1400, the same oath was ordered, the penalty again being twenty shillings. York, Minster Library Court book M 2 (1) f. f. 32r. See also *Acts of the Collegiate Church of SS. Peter and Wilfrid, Ripon*, 46-47.

In some defamation actions, the remedy was more elaborate. The order from a York case, for example, called for the defendant "at the time of High Mass, the parishioners being present (to) say in a loud and intelligible voice that he had erred in his words, which were uttered from false information of others, and (to) humbly ask pardon" of the complainant.<sup>54</sup> In a Hereford action, the defendant had again to publicly ask pardon during divine service and to say "that he had uttered the words out of evil will, not from zealotness, and that he had been moved by anger."<sup>55</sup> It is not romanticism, I think, to suggest that penalties such as these more effectively restored an injured reputation than the award of money damages would have. Perhaps many litigants would have preferred a pecuniary penalty. But that is not necessarily a criticism of the canonical action. Its aim was to punish unjust slander and to undo its effects, not to reward the avarice of litigants.

Most defamation cases, however, never reached the stage of sentence and penance. I have no exact figures, but certainly the large majority ended in compromise and agreement. The notation "pax" written alongside a case in the Act book marked a frequent end.<sup>56</sup> The continuance "*sub spe concordie*" was another.<sup>57</sup> A concord could be admitted even after formal sentencing where the parties had reached subsequent agreement.<sup>58</sup> The Church courts were never concerned to push defamation actions through to formal sentence. No special license to concord was demanded.

One of the principal goals of any legal system must be to bring quarrelling people to amicable settlement. Surely this is true where insulting and damaging words have been the substance of the quarrel. So far as the court records indicate, it was this goal which

54. ". . . quod tempore celebracionis maioris misse, parochianis congregatis, alta et intelligibili voce, dicat ipsum erronee huiusmodi verba per ipsum alias dicta ex falsa informacione aliorum dixisse et quod veniam postulet humiliter ab eodem." Borthwick Institute, Act book R. As. 55, f. 6v (1497). In another York case the defendant had to stand at the altar and say, "Ago pro eo quod Aniciam Stenys de Ebor nequiter diffamavi, a qua peto benevolenciam pro commissis." Act book R VII Cons. A B 2, f. 45v (1425).

55. ". . . quod veniret tempore alte misse ad pulpetum et ibidem publice peteret misericordiam a dicto domino Johanne et quod protulisset huiusmodi verba ex mala voluntate et non ex bono zelo, sed iracundia motus fuisset." Act book O/2, 50 (1442).

56. Lichfield, B/C/1/1, f. 39v (1465); Hereford, Act book O/2, 20, 69 (1442); Ely "Registrum Primum," f. 80r (1378).

57. Rochester, Act book DRb/Pa 1, f. 27r (1437); Canterbury, Act books Y.1.1, f. 51r (1373); Y.1.3, f. 54r (1417).

58. Canterbury, Act book Y.1.4, f. 112v (1423).

predominated in the Church courts in defamation cases. The Common Law limitation to purely spiritual punishment did not severely hamper the Church courts in this task. And it was a task of some consequence and value.

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It is too soon, as Professor Milsom has recently noted, to write the full history of early defamation at Common Law.<sup>59</sup> A good deal is already known, of course.<sup>60</sup> But only the painstaking examination of the early sixteenth century plea rolls will tell the story of the development of the secular remedy. The process will certainly have to be studied against the background of the canon law action outlined above. Comparison with canonical practice should illuminate the process by which the royal courts assimilated, or half-assimilated, the ecclesiastical action. It may be that some of the defects and anomalies of the Common Law remedy existed solely because they were taken over whole from the canon law.<sup>61</sup>

Even if this is true, however, it will not prove an equal weakness in the canonical action. That action was by no means perfect from a strictly legal standpoint. The failure to include allegations of professional incompetence and the too ready availability of the defense of prior defamation must be counted as faults in the law. But, when this has been said, the records tell a largely positive story. The Church courts took in a large class of defamatory language, they considered a broad range of evidence, and they made available a varied set of remedies. The records, examined here, suggest that the Church courts provided a useful remedy for men injured by harsh and insulting words.

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59. Milsom, *Historical Foundations*, 334.

60. See Holdsworth, *History of English Law*, v. 5, p. 205-12; C.R. Lovell, "The Reception of Defamation by the Common Law," 15 *Vanderbilt L. Rev.* 1051-71 (1962).

61. It seems likely, for example, that the distinction between libel *per se* and libel *per quod* can ultimately be traced to the canon law, although the categories naturally underwent changes over the course of time. But the early Common Law limited defamation *per se* to cases of accusations of crimes (along with professional incompetence and a few serious contagious diseases), and this may be because the canonical remedy was taken over. Holdsworth concluded that categories other than crimes were developed subsequently; see *History of English Law*, v. 8, p. 348-49. See also Milsom, *Historical Foundations*, 337-38.